United States Circuit Court of Appeals

For the Ninth Circuit

No. 3918

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION, AND MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, A CORPORATION, PLAINTIFFS IN ERROR,

VS.

MAUDE E. STEWART, DEFENDANT IN ERROR.

PETITION FOR REHEARING

S. A. KEENAN,
CHADWICK, MCMICKEN, RAMSEY & RUPP,
ATTORNEYS FOR PLAINTIFF IN ERROR
660 COLMAN BLDG. SEATTLE, WASHINGTON

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Now come the Plaintiffs in Error and most respectfully petition the court for a rehearing in this case. This petition is based chiefly upon the point that this court, according to the wording of its written opinion, did not consider what Planitiffs in Error deemed their main and controlling question on the appeal, viz: Is the presumption of suicide justified by the record?

In this court's opinion, it is finally stated: "we conclude that the weight of the evidence supports the *inference* that Stewart *drowned* in the Columbia River." If it had been left to the lower court to decide that Stewart met his death accidently or by suicide, the conclusion by this court, as above quoted, would be conclusive, but the lower court was limited by the pleadings and stipulation from finding that Stewart met his death in any other way than suicide. It was so apparent from the circumstances surrounding Stewart's disappearance or death, that he could not have accidently met his death, coming across on the boat,—that counsel for the widow at the very threshhold of the trial stipulated that Stewart deliberately killed himself by jumping from the ferry boat into the Columbia River.

Therefore, the only issue in both courts is: Did Stewart drown himself?

The trial court fully appreciated this, and frankly states that to decide the case he must say that Stewart disappeared or that he drowned himself. In the trial court's oral opinion, he states: "In this case the court is asked to choose between the theory that he destroyed himself physically by his own act and the theory that he banished himself from his friends and relatives forever and became

a wanderer and a tramp on the face of the earth, constantly on the alert, scanning every face for some look of recognition. You say he was a long-headed man. If he was, he must have known that was the fate that awaited him if he fled."

There is no positive evidence of the manner in which he left that boat.

It must be conceded, from the record, that there were at least two ways by which it was possible for him to have left the boat,—by the use of the life preservers or by getting off the boat unobserved on its landing.

The trial court in his decision states, that he presumed that Stewart committed suicide. The court so presumed or inferred in the face of the situation that Stewart had a possible means of escaping alive, and that he had every incentive imaginable to escape and go into hiding. And the further fact that many witnesses testified to having seen him alive afterwards.

To so infer or presume is in direct conflict with the presumption against suicide, as recognized by all the Federal Courts (authorities cited in brief for plaintiffs in error), as the courts have universally held "the fact (suicide) will never be inferred

unless the evidence is such as to fairly exclude every other reasonable hypothesis as to the cause of death." In this case, where the beneficiary is depending upon actual suicide, the same principle must prevail, and with like force and effect the rule must read "the fact (suicide) will never be inferred unless the evidence is such as to fairly exclude every reasonable hypothesis as to his escape." The rule as heretofore almost universally used, applied to the cause of death, where the death was actually established or admitted. Various reasons have been assigned for the adoption of this rule. In *Travellers' Ins. Co. v. McConkey*, 227 U. S. 661, the court observed as a reason for the rule: "It is manifest that self-destruction cannot be presumed. So strong is the instinctive love of live in the human breast and so uniform the efforts of men to preserve their existence, that suicide cannot be presumed."

The same principle was applicable to Stewart on March 17, 1921. Life was not only sweet and dear to him but he had every reason to escape and go beyond the reach of the hands and the eyes of all the people he had defrauded. And, therefore, it would seem if this opinion stands, that the rule against presumption of suicide is overruled and entirely disregarded by this court.

In *Connecticut Mutual Life Ins. Co. v. McWhirter*, 73 Fed. 444; 19 C. C. A. 519 (Ninth Circuit) this court directly approved an instruction of the court wherein the jury was charged, "the presumption is that McWhirter did not kill himself." McWhirter was either murdered or he committed suicide. Either conclusion might be drawn from the evidence. In that case, the court also remarked that talk by deceased about committing suicide did not justify the presumption of suicide.

However, it would seem that this particular question escaped the attention of this court in deciding the case. The court evidently, at the time, was under the impression that it was only necessary to find that Stewart was dead, accidently or by suicide. For, in the opinion of this court, page seven, it is observed: "The *inference* drawn by the District Court that Stewart was drowned becomes entirely reasonable." In other words, by oversight, or intentionally, this court, in its opinion, makes no reference, except at the commencement, to Stewart's suicide. Anyone reading the opinion, from the facts related therein, will unhesitatingly say that the only issue in the case was "did Stewart meet his death coming over on the boat accidently or by suicide?" If we are correct in this statement, then,

the *real issue* on *this appeal, has not* been determined by this court. For, the issue is limited to whether or not Stewart committed suicide. Under the evidence in the record, and under the well established rule of all the Federal courts, it would seem the inference of suicide is not justified. We most respectfully ask to have this, the real question on the appeal, decided.

PROOF OF DEATH

Where an insurance company receives proof of death, within due time, retains the proof and denies all liability, it will be presumed the company waived any further or other proof. Such, in substance, is the rule found in the cases cited in the court's opinion, but that rule is not applicable here. In this case, the companies at all times admitted their liability if Stewart is dead. *Death* is the only issue. By the terms of the contracts, the policies are not due until "due proof of death" is established. No objection was ever made to the "form" of the proof. *Prior* to the trial there was nothing offered that could be considered proof of death.

In the opinion, the court refers to affidavits being supplied. Shotswell made an affidavit, the substance of which is that Stewart got on the boat at Goble, was seen there when the boat got within a short distance of the Washington shore, that Stewart did not get off the boat on its landing at Kalama. From the affidavit it appears that the pilot on the boat observed Stewart, that five other passengers were on the boat and observed Stewart. Not a word by affidavit or otherwise was supplied to the companies from any other person on the boat. Accompanying this affidavit was a letter from the beneficiary's counsel stating "the facts are—and they can be amply proven—that Mr. Stewart faced criminal prosecution from a dozen different sources had he returned to Kelso, Washington. . . ." Another affidavit was made by the beneficiary in which she merely reiterates, from hearsay, the things set out in Shotswell's affidavit. In the face of that showing, emphasizing the fact that Stewart was a fugitive from justice, it was more probable that he escaped than that he killed himself. In these circumstances, it should not be held by the court that the companies should have conclusively presumed from this meagre statement that Stewart was dead and upon that statement pay over to the

beneficiary $86,000. On the contrary, it should be held that the companies were justified in requiring the beneficiary to establish the death of Stewart, and until that was established, there was no liability, under the terms of the policy.

It would appear from the opinion of the court that the companies' admission of liability, in the event of Stewart's death, was not taken into consideration by the court.

However, if the court concludes not to recede from the holding that the preliminary proofs were sufficient for the purpose of bringing these actions, yet, it should not be held that these policies were due until proof of death was established. Surely it cannot be held that that period was reached prior to the production of the testimony in court. The trial court frankly stated, upon consideration of all the evidence, that it could only presume death occurred on that night, and now in the written opinion of this court it is again frankly admitted "there may be a possibility that the man is alive . . . ." Hence, it would seem that every consideration points to the conclusion that these insurance contracts were *not due prior to the production of the proof in court.* If that be so, then, no interest can be allowed on the contracts prior to

that date. We believe it is clearly within the power and within the discretion of this court to hold that interest shall not accrue on these contracts until after the filing of the opinion and judgment of this court.

Such, in substance, was the decision of the court in *Rodgers v. Manhattan Life Ins. Co.* (Cal.) 71 Pac. 348: "If the insurance company had admitted the death of the insured, but contended upon some other ground that it was exonerated from liability, the admission of the death might be held to be a waiver of proof of the fact; but upon the face of the policy no cause of action accrued until proofs of the death were made, or the fact of the death was admitted. The court below did not err in holding that interest did not accrue prior to the presentation of proofs of the death required by the policy." Therefore, the judgment of this court ought to fix the date from which interest shall begin, in the event the lower court is affirmed. This point was advanced in the oral argument.

* * *

We, therefore, most respectfully petition this court for a rehearing in this case.

Dated at Seattle, Washington, January 30, 1923.

S. A. KEENAN,
CHADWICK, MCMICKEN,
RAMSEY & RUPP,
Attorneys for Plaintiff in Error.

We, the undersigned, of counsel for plaintiff in error, as such, do hereby certify that in our judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

Dated at Seattle, Washington, January 30, 1923.

A. S. KEENAN,
OTTO B. RUPP,
Of Counsel for Plaintiffs in Error.